AN ITALIAN LEGAL CASE NOTE

ADMINISTRATIVE COURT OF LOMBARDY (ITALY)
DISTRICT OF BRESCIA, 30 NOVEMBER 1992, N.1285
PARCO CASTELLI S.R.L. VERSUS
LOMBARDY LOCAL GOVERNMENT

WORKING PAPER NO. PONC46
DR ALCESTE SANTUARI

STUDIO LEGALE TRIBUTARIO
MILAN, ITALY

The Program on Nonprofit Corporations is a research unit at the Queensland University of Technology. It seeks to promote research from many disciplines into the nonprofit sector.

The Program on Nonprofit Corporations reproduces and distributes these working papers from authors who are affiliated with the Program or who present papers at Program seminars. They are not edited or reviewed, and the views in them are those of their authors.

A list of all the Program's publications and working papers is available from the address below.

Published by Program on Nonprofit Corporations
Queensland University of Technology
G.P.O. Box 2434
BRISBANE QLD 4001
Phone: 864 1268
Fax: 864 1812

ISBN 0-86856-994-1
ISSN 1037-1516

The present paper intends to enlighten a particular aspect of charitable organizations which is their registration in the regional lists for voluntary organizations. The aforementioned decision ruled that these organizations are entitled to adopt the form of cooperative society and consequently, when all the other legal requirements are complete, charitable organizations are to be enrolled. The registration has been subject to many criticisms and it is necessary to bring some light on a topic that hides behind it many legal and cultural repercussions concerning the role and the activities of nonprofit organizations in the Italian context.

PREMISE

By the Act of 11 August 1991, n.266, called "The Act on charitable organizations",[1] the Italian Parliament, though recognising that these organizations can be entitled to many benefits if they are registered in the regional lists, actually gave a great deal of importance and emphasis to the whole procedure of establishment of such organizations and, above all, to the to the control that the administrative authority exercise upon those organizations which apply for registration.

By taking the aforesaid decision, the Administrative Court of Lombardy according to section 3 of the Act of 1991 which states that charitable organizations are left free to adopt any legal form they regard as most appropriate for their purposes ruled that these organizations are also entitled to adopt the form of the cooperative society in order to fulfil their charitable objective as provided for by the very section mentioned above. The present paper is concerned with the analysis about the extend to which such a decision might represent a extensive interpretation of the provision according to which the legal forms to be adopted by nonprofit organization are absolutely free from any boundaries.

The first statement that seems to confirm what has been just said could come directly from the Act of 8 November 1991, n.381 concerning the so called "social cooperatives". This Act expressly provides that a cooperative society can be also used for purposes other than mutual and precisely for purposes to be reached "for the general interest of the community towards human promotion and social .... of citizens".

[1] For a first and general comment on this Act see M. COSTANZA, in *Corr.Giur.*, 1991.p.1074 ff.; for a detailed and more complete analysis of the same Act see V.ITALIA, *Il volontariato*, (Milan, 1992)

That which has been said so far is the necessary theoretical stratum to ascertain which company forms can be adopted by charitable organizations in the Italian system.

1. PURPOSES AND STRUCTURE OF VOLUNTARY ORGANIZATIONS

Section 2 of the Act of 1991 provides that according to the very Act the term "voluntary activity" is to be interpreted as that activity which is supplied in a personal, spontaneous and free manner, by means of the organization which the volunteer belongs to, without perusing any profitable object neither direct nor indirect and exclusively for solidarity purposes". Once the non profit purpose of voluntary organizations has been affirmed, and consequently once one of the characterising factor of nonprofit organizations has been identified, the law provision mentioned above adds that the voluntary activity has to be *exclusively directed to solidarity purposes*. This last formula seems to be even more general and ambiguous if they regard the different aspects that are hidden behind the concept of solidarity in the present cultural context. On the one side, the lack of a profitable objective immediately defines the class of associations that do not comply with the traditional company criteria. On the other side, the definition of solidarity purposes implies a multiplicity of interventions that are different from one another because of the internal or external destination of the activity that they carry out. Beside the typical solidarity of the trade union, which carry out their activities in favour of the workers who are registered with the trade unions themselves, there is also a kind of solidarity that involves associations, foundations, syndicates, clubs the members or beneficiaries of which are characterised by the same peculiar interest. Furthermore, there is a kind of solidarity that we could define in the strict sense which is performed by organizations having different cultural and ideological background in favour of those individuals who have less means to led a sufficient standard of life and therefore are the least protected in the collectivity. Therefore, mutual benefit charitable organizations are opposed to public benefit charitable organizations the activity of which is not directed towards a well defined group of individuals but they supply their services to the whole community or remarkable section of it. In this respect, one could rightly affirm that to confine "social" solidarity the content of the provisions of the Act of 1991 could be reductive and excessively discretionary.[2] The definition that is contained in section 2, subsection 1, though the literal content suggests the word "exclusively" is to be regarded as not exclusive because the legislator intended to

[2] N. RICCARDELLI, in *Giur. Comm.*, 1993, II.p.643 ff.

further stress the fact that charitable organizations do not have a proper subjective profitable characteristics.

If the solidarity purpose was to be a general concept not being able to define anything it would not only identify the charitable organizations as strictly regarded but any organization carrying out its activities without pursuing any profit at all, whatever its purpose may be. Therefore, I think we can affirm that the private dimension of the solidarity activity is not opposed to its public role since its contribution seems to be consistent with the public purposes, whether social or civil or cultural that represent the main legal reason which supports the whole life of non profit organizations. According to a certain view, which springs from a decision of the Italian Supreme Court, the notion of "solidarity purpose" that defines charitable organizations according to section 3 of the Act of 1991, is identified with a "style of life" which in itself could be expressed in any particular objective if it is directed towards individuals at large, that is towards the outside.[3] This would imply that the solidarity purposes would not be identifiable and therefore not completely similar to the charitable organizations strictly defined, that is those which supply the traditional services in favour of the individuals most in need. According to this reasoning, the specific definition that the legislator intended to apply would arise many questions for the scholar about the exact place to be given to solidarity purposes within charitable organizations.

On the one hand, should the intention of the legislator have been to underline the necessity for voluntary organizations to be non profit associations, by requiring the solidarity purpose the Act of 1991 would introduce any novelty as to the definition of these organizations. Indeed, if the essential factor of the organizations mentioned above should be identified with the solidarity function that is obviously opposed to the profitable one so much so that the pursuing of the latter is to be expressly prohibited in the Memorandum of Association or in the Articles of Association, the provisions of the Act of 1991 would seem to be an answer to the exigency of strengthening the non profit factor rather than taking into account a further difference with business corporations. On the other hand, if the Italian legislator should have intended to regulate a specific aspect of voluntary organizations, the Act would have not only confirmed such provision in other sections of the very Act but it would also have endeavoured to define the term "solidarity purpose" in a better way. Consequently, given the implicit difficulty of tracing back to a unmistakable definition of the concept of solidarity as previously stated, the Act appears to refer to a proper way of being of voluntary organizations and not to a well determined are in which they carry out their activities.

2. SUPREME COURT: DECISION OF 28 FEBRUARY 1992, N.75

The decision represents an important point of reference in order to better comprehend the phenomenon of non-profit organizations and especially their purposes relating to the role that is attributed to them in the context of the modern states. On that occasion, the judges of the Supreme Court established their decision exactly on the fact that solidarity purposes and volunteering are two inseparable elements of

[3] L.BRUSCUGLIA, *La Legge sul Volontariato. Analisi & Commento Giuridico*, (Padua, 1993), p.9.

the same body that is the non-profit organization. The Supreme Court ruled that volunteering is "[...] a way of being of the person within social relationship, or otherwise, a paradigm of social action which is likely to refer to single individuals or associations composed of several people" and that "as such" volunteering "runs away from any rigid classification regarding province, in the sense that is may find space and may be realized within any material field of community life [...]". From these statements one may infer that volunteering represents a mode by which single individuals or groups of people, which cannot be denied either to come out of private imitative or deprived from their public function by virtue of the fact that their activity and services are directed towards the outside world so as to match those needs that can be defined as social at large, cooperate to the fulfilment of those goals that are typical of an organized community. Voluntary organizations and therefore, the multiplicity of aggregative forms that spring out from the community, represent the means by which citizens can take effectively part in the political, economic and social organization of the country. Furthermore, they cooperate to realize public goals and to pursue the interests that the State and the other public administrations locate according to Section 2 of the Italian Constitutional Charter. The full and complete realization of these organizations comes within the general context of the inviolable human rights which recognise and guarantee dignity to man both as single individual both as together with other fellows in social forms in which he/she can develop their personality. In this respect, the Supreme Court also affirms such concept in the abovementioned decision: "[...] As fundamental model of the positive and responsible action of man who commits himself spontaneously and freely in favour of other individuals or in favour of collective interests worthy to be guaranteed [..] volunteering represents the most immediate expression of the primary social vocation of man, deriving from the original identification of the single individual with the social forms in which he can develop his personality and from the subsequent link of active belonging that connects man to the community of men. [Volunteering] is, in other words, the most direct realization of the principle of social solidarity, according to which each person is called to act not because of a utilitaristic return or because they are compelled to do so by an authority, but because of free and spontaneous expression of the deep social attitude of human beings. By implying the original connotation of man uti socius, this principle is included among the basic values of Italian legal system[..] Volunteering partakes in the nature of such fundamental rights: it takes part in it as a dialectic position intended to overcome the atomistic limit of individual freedom, in the sense that volunteering is an expression of this freedom that leads each single person on the road of the building of new relationships and links among men beyond the ties coming from public duties or authority commands".

The aforementioned decision, therefore, seems susceptible to be accepted where it seems to confirm that volunteering is, above all, an individual expression of the value of solidarity, and only, at a further level (but not necessarily) the associate expression of the value of same value, by defining it rightly, a *way of being of each person, fundamental model of the positive and responsible action of single individuals* and immediate image of the *original social vocation of man*.[4] Consequently, the Court stated both the individual and organized value of voluntary organizations by expressly recognising a new way of accomplishing with the supreme constitutional duties and of taking part in the life of the

[4] Ibid, p.10.

country.

3. THE DOCTRINE POINT OF VIEW

The law cases are followed by the doctrine that seems to sustain that by "the Act of 1991 the legislator expressly underlined the social and moral value of free non profit voluntary associations as means necessary for the growth of society, for the development of democratic rules, for progress intended to reach more substantial objectives of equality and participation of citizen".[5] On the contrary, the dominant doctrine seems to support the view according to which the Act of 1991 rules only the traditional and organized voluntary associations, that are mainly represented by large organizations working in relief, charitable or philanthropic areas. The approach of the Act of 1991 to a dynamic and ever increasing phenomenon such as volunteering appears to be ultimately defined by the extremely static approach of the legislator that does not seem to take into consideration flexible experiences

[5] On this issue, see L.MORABITO, *Legge-quadro sul volontariato n. 266 dell'II agosto 1991. Luci e ombre*, in Riv. amm., 1992,p.33.

that reveal themselves precious in many social situation such as home care, elderly and handicapped people relief, etc.[6]

Consequently, it seems as though there exists a kind of rigidity in the process of defining what voluntary organizations are. This difficulty could make it harder for those groups which are less organized on steady basis to be enrolled in the enrolled in the regional registers. In this respect, it is noteworthy that Section 3 of the Act of 1991 provides that the compulsion providing for the drafting of the balance-sheet does not apply to the informal or the least formalized groups, which, according to some recent survey, seem to represent not less than 20% of the whole Italian voluntary organizations. However, another survey underlines the novelty that the legislator introduced as to the term used to refer to the associations carrying out charitable purposely the term "organization". Indeed, this term includes a wider range of groups than the traditional concept of "board" or "organ" since it allows for a ample freedom of legal forms even though it does not seem to be able to solve positively the question about the least formalized organising forms.

By moving from the "open" concept of organization and taking into account the lack of a specific definition of organization itself, one might also affirm that should the requirement of "solidarity purpose" become a less distinct concept, lacking effective defining capacities, it would follow that any organization, for any working scope, including cultural, sport and recreational objectives, should regard itself as a voluntary organization with all the benefits and law facilities that come from legal recognition. In this direction, it is important to stress that it is not the sole natural thrust of the organizations, which aim to be enrolled in the regional registers so as to benefit from the facilities provided for by the law, to justify the interpretation above mentioned but also the nature and structure of several collective organizations that though they are interested in benefiting from the different tax and law treatment, they are above all interested in being recognised their activity towards the outside and therefore being recognised their solidarity nature.

From this point of view, the notion of solidarity, as has been already referred to, would acquire a wide meaning so as to identify any non profit organization that pursues a scope that the law regards as worthy to be protected and subsequently of public utility. In this respect, any possible objection about the possibility for the law of admitting any voluntary organization or those having solidarity purposes would cease to exist. In opposition to the dominant position of the great majority of the legal doctrine upon this issue,[7]volunteering cannot be regarded as either as a goal, because it necessarily represents a particular way of accomplishing with the objective to match with social needs, or a mode by which to replace the loopholes of the Welfare State. The Act of 1991 clearly intended to regulate in a confining manner the voluntary phenonemon so as to make non profit organizations subject to a welfare state which more than once has been showing its structural and cultural deficiencies. We are not talking about either "functionalization" or "institutionalisation" of volunteering but certainly we are referring

[6] See L.BOCCACIN, *La sinergia della differenza. Un'analisi socilogica del terzo settore in Italia*, (Milan, 1993), p.83.

[7] See COSTANZA, *op.cit.*, p.1074. The author seems to deny that organizations directed to fulfil educational, cultural and scientific purposes many be recognised as voluntary organizations by the law.

to a reduction of the contribution of non profit associations that are obliged to comply with provisions which often only the historical and traditional organizations are capable of fulfilling. From this it follows that the provisions of the Act of 1991 are insufficient because they do not provide for associations or foundations that though having different dimension and structure, do take actively part in the production and supply of public utilities.[8]

Accordingly, one could infer that the solidarity purpose cannot define only some organizations and not others because the solidarity objective is the very foundation of non profit groups even of those which are not established on a organized structure. In this respect, it is noteworthy that voluntary organizations might adopt a legal from that is not provided for by the Italian Civil Code because in the Italian legal system there is not the principle according to which aggregative forms have to assume a typical structure. In this case, the term "organization" that the legislator introduced is to be interpreted so as to allow for widest freedom of the private initiative in the choice, that is in the creation, of the legal form that is regarded as most adequate and responding to the purpose to be achieved. As it often occurs in Italian legal system, the activities that are supplied by single individuals or by means of forms which are different from those organized on a more steady basis are considered to be a way in which social participation and solidarity can be effectively performed. Yet, on the other hand, since the other forms of voluntary

[8] We are not dealing here, as has been supported by MARIANI (in BRUSCUGLIA, *op.cit.*, p.19), with the question relating to the identification of the common element of voluntary organizations with the voluntary labour, but with the problem concerning the provision of elastic formulas that allow easier procedures of granting of incorporation that, within the wide range of non profit activities may facilitate and sustain with greater commitment those associations that appear to work in particularly important and social areas of the entire community. This does not imply by any means to introduce a sort of "positive" discrimination but simply to attribute to some organizations and activities a priority in the realization of programmes and projects. Simultaneously, all non profit projects should be recognised the same dignity both from the substantial and formal point of view.

associations than those legally provided for do not represent the subject of the aforementioned Act they represent a phenomenon that goes beyond the actual law.

On principle, if there are not further qualifying elements, any voluntary organization which is freely established could adopt any legal form compatible with the organizing structure: association, foundation, club, company. These legal forms should instead be characterised by the lack of profitable purposes and more precisely by the non distribution for those who somehow control over the organization. The combined reading of Section 2 and Section 3 of the Act of 1991 seems to support the idea that the voluntary activity is defined by the lack of profitable objective, even indirect. Thus, volunteering would adopt any legal organization upon the condition that the Memorandum of Association and the Articles of Association provide for the nondistribution constraint. Yet the lack of profitable purposes does not seem to be relevant for the legislator of 1991 because the Act does not mention such requirement as premise for the organization to adopt a particular legal form instead of another one.

On the contrary, in the respect the Circular of the Minister of Finance of 25 February 1992, n. 3 read that the lack of profitable purpose makes it impossible for the voluntary organizations provided for by the Act of 1991 to adopt, for tax purposes, the form of company "given in particular the fact that Section 2247 of the Civil Code provides that the company contract implies *the common enterprise of an economic business so as to divide the profits*". This circular excluded therefore also cooperative societies from the legal forms that voluntary organizations can adopt, thus reaffirming the incompatibility of any direct benefit or utility that members could obtain with the solidarity purposes stated in the Act of 1991, n.299.[9] Consequently, the Minister contributed to limit the sphere of the legal forms that voluntary organizations can adopt: "solidarity purpose" becomes then a negative requirement without which the very organization could not be freely established.

4. THE FREE CHOICE OF THE AGGREGATIVE FORMS ACCORDING TO THE ACT ON THE VOLUNTARY ORGANIZATIONS

As has been already pointed out, Section 3, sub-section 2 of the Act of 1991 stated that voluntary organizations can adopt "the legal form that they regard as most suitable for their purposes except the compatibility limitation regarding the solidarity purpose". The latter therefore operates as the ultimate reason for the action of voluntary organizations which will not adopt the form of company or cooperative society as the doctrine seems to sustain.[10] Consequently, the legislator, after providing that voluntary organizations can adopt any legal form that they consider to be consistent with the organization's purpose, it seems to refer generally to the legal precepts spectrum of the reference appears to be favourable for the voluntary organizations already established that would not be

[9] The complete text of the aforementioned Circular is contained in ITALIA, *op.cit.*, 327. *Contra* see Consiglio di Stato, 18 December 1991, n.2980, in *Nuova giur. vic. comm.*, 1992, I,p.49 ff., with the comment of A. FUSARO.

[10] A. FUSARO, *L'art. 17 cod. civ. e le associazioni "di volontariato" non riconosciute*, in *Nuova giur. civ. comm.*, 1992.I,p.499.

compelled to transform their legal form since they should adapt it to the new Act.[11]On the other hand, should Section 3 of the Act of 1991 be interpreted extensively it would inevitably imply to legitimate the establishing of several aggregative forms distinct from the traditional and generally ones because of the lack of profitable purposes. In this respect, although in principle the legislator seems to recognise that both associations and foundations can be used as legal forms to establish voluntary organizations, the favour of the Act of 1991 seems to be directed towards the incorporated and unincorporated associations. Thus, the foundation, which has been traditionally structured as a complex of asserts to be used for the realization of a particular purpose exclusively stated by the founder, does not seem to be consistent with the democratic character that the Act of 1991 required for voluntary organisations.[12]Some scholars assume that the peculiar character of foundations, that is the complex of assets destined to a purpose, represents a secondary importance because the Act of 1991 clearly provides for the necessity of the dominant and main contribution of personal and free activities supplied by the members.[13] These affirmations are opposed to the idea according to which the intention of the legislature of 1991, like the English legal system, was to street the purposes that the organization intends to pursue rather than to come to a stringent definition of the legal structure that the organization itself would adopt. Although the Act of 1991 did not expressly refer to any particular legal from the fact that foundations are excluded from the consistent legal forms lead scholars to sustain that only and exclusively associations respond to the legal requirements provided for by the aforementioned Act. It follows that the choice that parties are given to determine the legal form for voluntary organizations is confirmed to the granting of legal personality. The legislator, therefore, did not refer to the wider term of non-profit organizations, within which many aggregative forms would have been included because of the common lack of profitable purposes even though having different structure. From the combined reading of the sections of the Act of 1991 it seems to follow that the legislature intended to provide for a new type of aggregative body, as it occurred when sport associations and social cooperative societies were established. Consequently, the Act of 1991 did not simply recall one of the traditional legal form provided for by the law the Articles of Association of which would compulsory include some specific classes such as the solidarity purpose, the prevalent contribution of members by means of free labour, the open and democratic structure of the organization.

In conclusion, though the legislator intended to give parties a wide freedom of choice as to the legal form to be adopted in order to fulfil the purposes peculiar to voluntary organizations, the Act of 1991 did indeed subject such freedom to a series of heavy limitations. The internal democratic character and the personal sharing of members of the voluntary activities seems to lead to exclude that those

---

[11] Thus, M.D. STALTERI, *Riflessioni su un recente modello di legisazione*, in GLI ENTI "NON PROFIT" IN ITALIA, by G. PONZANELLI, (Milan, 1994).

[12] See M.GORGONI, in *Commentario al cod, civ.*, by Scialoja e Branca, (Bologna-Roma, 1976), who is in favour of a foundation form in which both the relevant contribution of voluntary labour of members of a the democratic character mentioned above are provided for.

[13] G. PONZANELLI, *Nuove figure e nuove problematiche degli enti "non profit"*, in GLI ENT "NON PROFIT". NUOVE FIGURE. NUOVE PROBLEMATICHE. Giornate di studio organizzate dal Comitato Regionale Notarile Lombardo, (Milan, 1993).

who promote a voluntary organization may adopt, or even deliberately create, a legal structure that would be new and would not come within the forms already provided for by the law. It seems therefore logic to state along with other scholars,[14] that the intention of the legislator (*voluntas legis*) which appears to affirm freedom of association concerning the realization of a public scope became an ambiguous statement that is not easy to understand. However not only is such intention subject to many different interpretations but it also automatically reduced the sphere of intervention and contract of members of voluntary organizations.

[14] RICCARDELLI, *op.cit.*, p.657 ff.